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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 325

COLUMBIA PROPERTIES, INC.,
Appellant,

vs.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 325

COLUMBIA PROPERTIES, INC.,

Appellant,

vs.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA,

NOBLE W. HOLLAR, FRANK G. THOMPSON, AND ADOLPH L. FOSSLER, MEMBERS OF THE STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA,

COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,

OSCAR H. SCHMIDT, OTTO H. MEYER, EDWARD L. GOEBEL, JAMES R. DUNCAN, AND CHARLES GRISSOM, MEMBERS OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,

OSCAR H. SCHMIDT, COUNTY ASSESSOR OF VANDERBURGH COUNTY, STATE OF INDIANA,

MARTIN FULLING, TOWNSHIP ASSESSOR OF KNIGHT TOWNSHIP, VANDERBURGH COUNTY, STATE OF INDIANA,

OTTO H. MEYER, COUNTY AUDITOR OF VANDERBURGH COUNTY, STATE OF INDIANA,

EDWARD L. GOEBEL, COUNTY TREASURER OF VANDERBURGH COUNTY, STATE OF INDIANA,

ROBERT C. KOLLKER, COUNTY ASSESSOR OF VANDERBURGH COUNTY, STATE OF INDIANA,

JOHN A. ELLERT, COUNTY AUDITOR OF VANDERBURGH COUNTY, STATE OF INDIANA,

ROBERT C. KOLLKER, JOHN A. ELLERT, AND JOHN J. BOINK, MEMBERS OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,
CLYDE OVIATT, COUNTY TREASURER OF VANDERBURGH COUNTY, STATE OF INDIANA,
CLYDE OVIATT, MEMBER OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,

Appellees

STATEMENT AS TO JURISDICTION

Pursuant to Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, the appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

1. Form and Nature of the Action

This action was brought in the Circuit Court of Vanderburgh County, Indiana. The purpose of the action was to set aside the property tax assessments made by appellees as of March 1, 1950, on certain real property owned by appellant. The property in question consisted of forty-five 8-apartment buildings.

Appellant's pleading, denominated an Amended Petition in Appeal and Amended Complaint, attacked the assessments as violative of the law of Indiana. The said pleading (which is incorporated herein as Exhibit B to this jurisdictional statement) also claimed that, if the Indiana assessment statutes be construed to authorize these assessments and the procedure adopted in making them, the said statutes as applied in this case are repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Appellee filed general demurrers to the said pleading, which were sustained without opinion. Appellant declined to plead further, suffered adverse judgment, and took a timely appeal to the Supreme Court of Indiana. On the appeal to that Court, appellant preserved the Federal questions raised in its pleading, by assigning them as error in the Indiana Supreme Court. Assignments of Error Nos. 6 and 7, which preserve these questions, are incorporated herein as Exhibit C to this jurisdictional statement.

On May 8, 1953, the Supreme Court of Indiana rendered its opinion and judgment affirming the judgment of the trial court. The said opinion is incorporated herein as Exhibit A to this jurisdictional statement.

The Indiana Supreme Court's decision is conclusive, of course, on all questions of Indiana law, and those questions are not before this Court. The gist of the appeal to this Court is (a) that the property tax assessment statutes of Indiana, as construed by the highest court of the State, authorize the making of a final assessment of appellant's property without affording to appellant—either at the administrative level or at the judicial level—an opportunity for a *hearing* which satisfies the minimum requirements of procedural due process; and (b) that the said statutes, as so construed, authorize an *intentional and purposeful discrimination* against the plaintiff, as compared with the owners of similar properties in the same locality.

2. Statute Sustaining Jurisdiction

Jurisdiction of this Court on the present appeal is sustained by 28 U. S. C. § 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. * * *"

3. State Statutes Involved

As will appear hereafter in the discussion of the substantial Federal questions involved (Point 9 hereof), appellant's claim is (a) that *somewhere* along the line, before property tax assessments pursuant to the Indiana statutes become final, the taxpayer must be accorded the right to a constitutionally sufficient hearing; and (b) that *somehow* in its property tax assessment statutes Indiana is obligated to afford the taxpayer a constitutionally sufficient remedy against hostile discrimination.

Since the appellant claims only that the foregoing safeguards must be included somewhere in the statutory assessment scheme, and does not claim that they must be granted by any particular agency or court, or at any particular stage of the assessment process, it is not possible to single out for attack any individual section or sections of the Indiana statutes. The objection is that, as construed, these statutes fail to include the minimum safeguards required by the Fourteenth Amendment against procedural unfairness and hostile discrimination, and that as applied to this appellant in this case the property tax assessment statutes of Indiana are invalid as a whole.

The Indiana property tax assessment statutes appear in Title 64 of Burns Indiana Statutes (1951 Replacement, Vol. 11, Part 2). In so far as they apply to assessments on real estate improvements of the type here involved, the following sections establish the principles and procedures to be followed: Sections 64-1009, 64-1019, 64-1019b, 64-1020, 64-1022, 64-1303 and 64-1321.

Of the foregoing sections, Section 64-1020 has particular relevance. It provides:

> "*Appeal by owner from action fixing value.*—The owner of any property hereafter assessed for taxation, or against or on which any tax may be sought to be collected, shall have the right of appeal from the action of the county board of review or any other board authorized to fix the value of property for taxation, including the state board of tax commissioners, to the circuit or superior court of the county in which said property is situated. Appeals may be consolidated, at the request of the appellants, in order to save the expenses thereof when it can be done in the interest of justice, such appeals to be taken by filing a written notice, asking for such appeal, with the board of review or the state board of tax commissioners, as the case may be, at any time with ten [10] days from and after said county board of review or said state board of tax commissioners finally make and adopt said valuation, fixing the value of any such property for purposes of taxation. Upon such appeal being asked for, it shall be the duty of the county auditor, in the case of appeals from the county board of review, and the secretary of the state board of tax commissioners, in cases of appeal from said state board, to make out and certify to a complete transcript of the proceedings, not including the evidence, had with respect to the property of the person so appealing and transmit the same to the clerk of the circuit or superior court in the county in which said property is located, designated by the appellant. Such appeal shall be tried by the court without the intervention of a jury, and said trial of such issue shall be governed by the laws governing civil actions."

On the question of hostile discrimination, appellant particularly complains of the Reassessment Act of 1949, Indiana Acts 1949, ch. 225, which appears in Burns Indiana Statutes (1951 Replacement, Vol. 11, Part 2, following §64-1019), as such statute has been applied in this case.

The Amended Petition in Appeal and Amended Complaint (Par. 7), alleges that this was the statute under which the appellees purported to act in making the assessments here involved. On its face, the Reassessment Act appears to command a complete reassessment of all real estate in Indiana "For the purpose of securing a just valuation for taxation" (§ 3), subject to the following limitation (§ 5):

> "The reassessments shall be based upon a consideration of all the elements provided for in section 3 hereof, but the rate of assessment on lands shall not exceed thirty-three and one-third per cent of the market or sale value as of March 1, 1949, and the rate of assessment on improvements shall not exceed thirty-three and one-third per cent of the average reproduction cost of improvements based on construction costs as of March 1, 1949."

The statute goes on to provide for the preparation of detailed rules, regulations, forms and standards for use by the assessment authorities, and provides (§6):

> "The rules, regulations, forms and standards originally adopted by the state board of tax commissioners pursuant to the provisions of this act, together with any amendments or modifications thereof subsequently adopted, shall constitute the basis for the determination of value, it being intended that such reassessment shall be on the basis of a just valuation and at a uniform and equal rate of assessment, taking into consideration all of the elements referred to in sec. 3 hereof, in so far as the same shall be applicable."

In this case the Indiana Supreme Court has necessarily held that, despite the avowed purpose of the Reassessment Act of 1949, neither that Act nor any other provision of the Indiana assessment statutes gives a taxpayer the right to have a tax assessment set aside on the ground that it embodies an intentional and purposeful discrimination

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against the taxpayer, or the right to a judicial hearing (either by a court or by an administrative agency) on the question whether the assessment lacks rational factual foundation. Said decision brings the validity of the assessment statutes into question, where as here there has been a timely and distinct claim by appellant that said statutes, as applied to it, are unconstitutional. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289 (1921).

4. The Opinion Below

The opinion of the Indiana Supreme Court (Appendix A hereto) was rendered May 8, 1953. There was no dissenting opinion. The opinion is not yet officially reported, but is shown in 111 N.E. (2d) 891.

5. Finality of the Judgment

Under the established Indiana practice, the judgment of the Supreme Court of Indiana in an appealed case consists of the order made at the close of the deciding opinion. The Clerk makes a minute of the decision and order, which is signed by the Chief Justice, and no separate or other judgment is entered. The judgment so made when the case is decided is a final judgment, regardless of whether a petition for rehearing is filed. *Southern Railway Co.* v. *Clift*, 260 U.S. 316 (1922).

The judgment of affirmance entered May 8, 1953, was therefore a final judgment. It completely determines the controversy.

6. Timely Application for Appeal

The judgment appealed from was entered May 8, 1953. The appeal was applied for and allowed July 31, 1953, less than ninety days thereafter.

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7. Origin of Federal Questions and Rulings of the Courts Below

Under established Indiana practice, the Amended Petition in Appeal and Amended Complaint is treated for all purposes as an original pleading. As stated in Point 1 hereof, the due process and equal protection questions were specifically raised in that pleading (Appendix B) and were preserved by proper assignments of error on the appeal to the Supreme Court of Indiana (Appendix C). Both state courts ruled adversely to the appellant, and thereby necessarily rejected these claims of Federal right.

8. Highest State Court

The Supreme Court of Indiana is the highest court in that state in which a decision can be had. It is the Indiana court of last resort. Indiana Constitution, Art. 7, § 1.

9. Substantiality of Federal Questions

A. *The Procedural Due Process Question.* Appellant's claim on this branch of the case can be very simply stated: A state does not have the right to assess property taxes without affording to the taxpayer, at some stage of the proceeding before the assessment becomes final, a constitutionally sufficient hearing of the question whether the tax is incorrect, arbitrary or unreasonably discriminatory.

Appellant does not base its claim on the contention that the hearing must be in a court rather than before an administrative agency. It is the character of the hearing, rather than the character of the tribunal, which is here in issue. The point urged by appellant is that some tribunal must afford a taxpayer an opportunity for a hearing, judicial in character, on the judicial questions inherent in property tax assessments.

It has long been established that, for due process purposes, property tax assessment is a judicial function. *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 709-710 (1884); *Londoner* v. *Denver*, 210 U. S. 373, 385-386 (1908). As was said by Chief Justice Vinson (then a member of the District of Columbia Court of Appeals), holding a property tax assessment void in *Tumulty* v. *District of Columbia*, 102 F. (2d) 254 (1939):

> "• • • The Supreme Court of the United States has definitely declared that 'the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require.' And that 'before an assessment of taxes could be made upon omitted property, notice to the taxpayer with an opportunity to be heard, was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace. • • •" [Footnotes omitted.] (At p. 262.)

This Court has held invalid a state property tax assessment statute on the ground that it limited the taxpayer's hearing to the issues of fraud and corruption in the assessment. *Central of Georgia Railway Co.* v. *Wright*, 207 U. S. 127 (1907). It was held that the taxpayer is entitled to a hearing on the correctness of the assessment. See also *Orcutt* v. *Crawford*, 85 (F. (2d) 146, 148-149 (C.C.A. 10, 1936). The reason for the rule is obvious. Dishonest public officials will probably always be with us; but, unfortunately, their dishonesty is rarely susceptible of direct legal proof. Requests for bribes, and reprisals for refusal to give them, are not often executed so clumsily that they can be proved in court. A rule of law immunizing assessments from attack except on the ground of provable dis-

honesty would increase to an intolerable degree the power of dishonest officials.

The right to a ***hearing*** is more than a right of *petition*, which is all the Indiana statutes, as construed and applied in this case, grant to appellant. A "hearing" is more than an audience, at which the taxpayer can state his side of the case and do no more. A hearing, in the constitutional sense, includes a chance to know the opposing evidence (if any); to test it by cross-examination; and to rebut it.

The meaning of the term "hearing" was authoritatively explained by Chief Justice Hughes in *Morgan* v. *United States*, 304 U. S. 1, 18 (1938):

> "In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

This idea has found expression in two recent constitutional cases involving the requirement of due process under

the Federal Constitution. In *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 170 Fed. 2d 793 (1948), the Court of Appeals of the District of Columbia said (at page 805):

> "* * * Due process requires not only opportunity for the presentation of evidence and the cross-examination of witnesses but also opportunity for argument. Londoner v. Denver, 1908, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103; Morgan v. United States, 1938, 304 U. S. 1, 18, 58 S. Ct. 773, 999, 82 L. Ed. 1129; Erie R. Co. v. Paterson, 1910, 79 N. J. L. 512, 76 A. 1065."

And in *Philadelphia Company* v. *Securities & Exchange Commission*, 175 Fed. 2d 808 (1948),[1] the Court of Appeals for the District of Columbia said (at page 817):

> "It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution."

The burden of taxation has become so great that the importance of fairness and equality in assessment procedure is more important today than it has ever been in the past. An erroneous tax assessment can spell the difference between profitable operation and bankruptcy, particularly for an enterprise whose earnings flow from property rentals

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[1] In this case, certiorari was granted, the judgment of the Court of Appeals was vacated and the case was remanded with directions to dismiss the case as moot, on joint motion of the parties, 337 U.S. 901 [1949]. However, there is nothing to indicate that this Court disapproved of the statement of the law which is contained in the excerpt set forth above.

and which competes with similar enterprises for the favor of tenants.

The discretionary judgment of assessment officials on valuation questions is immune from judicial review unless it is arbitrary or unreasonably discriminatory. But this very fact emphasizes the importance of preserving the minimum procedural decencies, so that, in the rare case when the taxpayer can show that the administrative discretion was exercised arbitrarily and without foundation in fact or was not exercised at all, relief can be had. The taxpayer in this case has offered to make such a showing, and claims that the Fourteenth Amendment guarantees its right to do so.

The Supreme Court of Indiana has held otherwise. Appellant contends that this ruling was erroneous, and creates a substantial Federal question.

B. The second substantial Federal question is whether appellant has stated a case of unconstitutional discrimination. It should be noted that this case comes up on the pleadings, so that no question arises as to whether the taxpayer has sustained its admittedly heavy burden of proof on this issue. The only question is whether the well-pleaded allegations of the Amended Petition in Appeal and Amended Complaint (Appendix B), which on demurrer must be taken as true, state a case under the equal protection clause of the Fourteenth Amendment.

Paragraphs 8 and 10 of that pleading clearly allege, first in detail (Paragraph 8(b)) and then in summary (Paragraph 10(c)) that the appellant's properties were intentionally and purposefully assessed far higher than the only similar properties in the same locality. The said similar (and competing) properties are described fully, as are the properties of appellant. Yet the Indiana Supreme Court has necessarily held that the Indiana assessment statutes permit such discrimination. The law as announced

by this Court is to the contrary. See *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 (1931); *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 416 (1920).

The fact that the alleged discrimination was directed at one taxpayer, and not against a larger class of which it is a member, aggravates rather than mitigates the wrong. As Chief Justice Stone said in *Snowden* v. *Hughes*, 321 U. S. 1, 9-10 (1944):

> "Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long-continued."

Arbitrary discrimination against a single taxpayer is inequality in its most extreme and shocking form.

The Supreme Court of Indiana has held such discrimination to be lawful. Appellant contends that this ruling was erroneous, and creates a substantial Federal question.

C. A subsidiary Federal question is presented by the ruling of the Indiana Supreme Court (see opinion, Appendix A hereto), that the Amended Petition in Appeal and Amended Complaint contains "not * * * conclusions of fact, but conclusions of law." So far as the questions of Indiana law are concerned, this utterly remarkable ruling is of course conclusive. But so far as the Federal questions referred to above are concerned, it is not.

This Court has repeatedly and consistently held that the sufficiency of a pleading to set up a claim of Federal right is itself a Federal question, and that this Court will not be bound by the state court's ruling. *First National Bank* v. *Anderson*, 269 U. S. 341 (1926); *Brown* v. *Western Railway of Alabama*, 338 U. S. 294 (1949). Such a rule is essential, of course, unless state courts are to be given a free hand to veto appeals from their decisions to this Court.

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There is little need to labor the point that in this case the facts supporting the Federal due process and equal protection points were well pleaded. The pleading (Appendix B hereto) speaks for itself. We refer particularly to Paragraphs 7(d), 7(e), 8(b), 9, and 10(c). The ruling of the Indiana Supreme Court to the contrary is plainly erroneous, and itself creates a further substantial Federal question.

10. No Adequate Non-Federal Ground

We doubt that it will be seriously urged that there is an adequate non-Federal ground on which the decision of the Indiana Supreme Court can be sustained.

As has been shown, the sufficiency of the pleading to set up claims of Federal right involves a Federal and not a state question. We wish to refer briefly, however, to the fifth paragraph of the State Court's opinion, in which it is said that appellant has not negatived the possibility that the assessments in question might have been based on "observation" by the assessing officials.

The appellant's pleading alleges that the assessments were based either on appellant's own evidence, which afforded no rational foundation for them, or on opposing evidence of which appellant was kept in ignorance. This is all appellant knows or can know.

If the assessments were in fact based on "observation," the appellant is entitled to a *hearing* on the question whether that observation could reasonably have justified the assessments, and could reasonably have justified the discrimination complained of. Appellant seeks only the opportunity to prove that the assessments could not be so justified. Unless the "observation" (if any) is reported in open hearing where it can be tested on cross-examination and perhaps rebutted, no such opportunity exists. An "observa-

tion" secretly reported to the assessing authorities is not constitutionally sufficient evidence.

The State Court cannot defeat appellant's Federal claims by requiring appellant to allege or negative a fact which is admittedly outside appellant's knowledge—particularly where this lack of knowledge is one of the very grounds of appellant's Federal claim.

Conclusion

For the foregoing reasons, appellant respectfully submits that this Court has jurisdiction of the appeal.

Respectfully submitted,

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Dated: July 31, 1953.

APPENDIX A

OPINION OF FLANAGAN, J., FOR SUPREME COURT OF INDIANA

(Rendered May 8, 1953)

Appellant contends in this appeal that the County Board of Review of Vanderburgh County and the State Board of Tax Commissioners of the State of Indiana "arbitrarily, capriciously, wrongfully, unlawfully, illegally and without reasonable basis in fact," placed property owned by it in grade "average" instead of "low cost" upon its reassessment under Chapter 225 of the Acts of 1949 (Acts 1949, page 722; Notes to § 64-1019, Burns' 1951 Replacement).

The above act provides for reassessment of all real estate in Indiana "under the general supervision of the State Board of Tax Commissioners." It gives that board broad powers to adopt rules for the guidance of assessing officials. Among other rules adopted by the board was one providing for classification of real estate improvements, including classes termed "average" and "low cost." The rule also provided guides for determining the correct classification. This appeal seeks to present the question as to whether these guides were properly followed.

Courts may not take over the functions of the administrative department of government. Article 3, Section 1, Constitution of Indiana. The right of appeal to the courts exists, however, whenever a judicial question is to be presented. This necessarily includes fraudulent, arbitrary, or capricious decisions by an administrative body.

Peden et al. v. Board of Review of Cass County (1935), 208 Ind. 215, 195 N. E. 87;

Warren v. Indiana Telephone Co. (1940), 217 Ind. 93, 26 N. E. 2d 399.

The complaint in this case alleges *in words* that the action of appellees was taken "arbitrarily, capriciously, wrongfully, unlawfully, illegally and without reasonable basis in fact," but fails to state facts showing the action taken to

be of such nature. The line is sometimes close between the question of whether an allegation is a conclusion of fact or a conclusion of law. Conclusions of fact have been made by statute proper pleading, subject only to a motion to make more specific. Burns' 2-1005, 1946 Replacement. However, a conclusion of law adds nothing to the complaint. In the pleading before us, we do not have conclusions of fact, but conclusions of law. Therefore, the allegations, "arbitrarily, capriciously, wrongfully, unlawfully, illegally and without reasonable basis in fact," being conclusions of law, cannot help the complaint.

Stuck v. Town of Beech Grove (1929), 201 Ind. 78, 166 N. E. 153.

The complaint does allege that the only testimony presented to appellees was that of the appellant, which was in its favor. But the rules of the board, relied upon by appellant, provide that the grade as to class "average" or "low cost" "shall be determined by observation." Observation constituted evidence, and appellant's complaint does not negative the existence of this type of evidence.

The trial court correctly sustained the demurrer to the complaint.

Judgment affirmed.

APPENDIX B

AMENDED PETITION IN APPEAL AND AMENDED COMPLAINT

(Caption and exhibits omitted)

Columbia Properties, Inc., appellant and plaintiff herein, and hereinafter referred to as "plaintiff", by way of appeal from the action of the defendants herein and especially from the action of the County Board of Review of Vanderburgh County, State of Indiana, and the action of the State Board of Tax Commissioners of the State of Indiana, in fixing the values of the properties hereinafter named for the pur-

*poses of taxation and for its cause of action against the de*fendants herein and each of them, makes the following allegations:

1. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business in Evansville, Vanderburgh County, State of Indiana.

2. The plaintiff is the owner in fee simple of the following described real estate located in Knight Township, Vanderburgh County, State of Indiana:

> The improvements upon the following described real estate located in Vanderburgh County, Indiana:
>
> Lots 1A & 1B, 2A & 2B, 3A & 3B, 4A & 4B, 5A & 5B, 6A & 6B, 7A & 7B, 8A & 8B, 9A & 9B, 10A & 10B, 11A & 11B, 12A & 12B, 13A & 13B, 14A & 14B, 15A & 15B, 16A & 16B, 17A & 17B, 18A & 18B, 19A & 19B, 20A & 20B, 21A & 21B, 22A & 22B, 23A & 23B, 24A & 24B, 25A & 25B, 26A & 26B, 27A & 27B, 28A & 28B, 29A & 29B, 30A & 30B, 31A & 31B, 32A & 32B, 33A & 33B, 34A & 34B, 35A & 35B, 36A & 36B, 37A & 37B, 38A & 38B, 39A & 39B, 40A & 40B, 41A & 41B, 42A & 42B, 43A & 43B, 44A & 44B, 45A & 45B, all in Gerling Terrace, a subdivision in the City of Evansville, Vanderburgh County, Indiana, according to the recorded plat thereof,

and has been the owner in fee simple of said real estate continuously since on or before the 18th day of March, 1949.

3. Upon each of the ninety (90) above mentioned lots is located a two-story frame building containing four (4) apartments, each such building being joined by a party wall to a similar building on an adjoining lot, the building on each lot bearing the designation "A" being thus joined to the similar building located on the lot of the same number bearing the designation "B". For purposes of tax assessments, the defendants have treated each of the above mentioned sets of lots designated "A" and "B" respectively (there being forty-five (45) of said sets of lots in all) as a single unit. The improvements on the above described real estate have therefore been subjected to forty-

five (45) separate assessments. Said improvements have existed on said respective lots continuously since on or before March 1, 1949.

4. The Act of the Indiana General Assembly entitled "An Act Concerning the Reassessment of Real Estate and Improvements Thereon for Taxation Purposes" and being Chapter 225, Sections 1 through 13, page 722 of the Acts of the Indiana General Assembly of 1949, provided in part that all real estate and improvements thereon in this State would be reassessed as of March 1, 1950 (Section 1); that the State Board of Tax Commissioners would adopt and prescribe rules, regulations, forms and standards for use in making such reassessment (Section 2); that said rules, regulations, forms and standards would "provide * * * for classification of improvements on the basis of size, location, use, type and character of construction, age, condition, cost of reproduction, earning capacity, and such other bases as may be just and proper" and were further to

> "set out methods and instructions for determining (a) the proper classification of lands and improvements, (b) the size thereof, (c) the effect of location on value, (d) depreciation, including physical deterioration or functional, economic or social obsolescence, (e) cost of reproduction of improvements, (f) productivity or earning capacity, (g) capitalization of income, and (h) valuations of land and improvements on the basis of the foregoing elements, and such other elements as may be just and proper" (Section 3).

The said Act further provided that the State Board of Tax Commissioners, in adopting such rules, regulations, forms and standards, would comply with "the provisions of the general law relating to the establishment of a uniform method of making, promulgating and publishing of rules by agencies of the state" (Section 4) and that:

> "The rules, regulations, forms and standards originally adopted by the State Board of Tax Commissioners pursuant to the provisions of this Act, together with any amendments or modifications thereof subse-

quently adopted, shall constitute the basis for the determination of the value, it being intended that such reassessment shall be on the basis of a just valuation and at a uniform and equal rate of assessment, taking into consideration all of the elements referred to in Sec. 3 hereof, in so far as the same shall be applicable" (Section 6).

5. On May 4, 1949, acting pursuant to the aforesaid statutory direction, the State Board of Tax Commissioners approved and adopted its Regulation No. 12. Said regulation was approved by the Governor, was approved as to legality by the Attorney General, was filed with the Secretary of State and Legislative Bureau on May 6, 1949, and since that date and at all times pertinent to this action has been in full force and effect. Said Regulation No. 12 provided in part:

"Article 2.

For the purpose of securing a just valuation for the taxation of all real estate and improvements thereon, in accordance with the terms of Section 3 of said Chapter 225 of the Acts of the Indiana General Assembly of 1949, and subject to the limitations imposed by said Act, particularly Section 5 thereof, township and county assessors shall use and apply a method which will result in an equalized assessment. Such method shall include the use and application of a uniform assessment guide, code of standards and conversion tables for assessment of real estate and improvements thereon. The State Board of Tax Commissioners hereby approves and adopts, for such purposes, its "Real Estate Assessment Guide No. 1 * * *"

A true copy of said Real Estate Assessment Guide No. 1 is attached hereto and made a part hereof and marked "Exhibit A."

6. The said Real Estate Assessment Guide No. 1 prescribes in detail the valuation methods to be followed with respect to particular types of land and improvements. The method prescribed with respect to residential improve-

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ments, including the property involved in this case, is set forth on pages 44 and 45 of the said Real Estate Assessment Guide No. 1. The method thus prescribed involves the following steps:

(a) Determination of the *class* within which the residence falls, such as one story; one family, 1½ story; one family, two story; etc., in order to determine which of several detailed schedules is applicable in the particular case;

(b) Determination of the *grade* or cost group within which the residence falls, such as "Low Cost," "Average" or "Good," in order to determine from the applicable schedule the basic reproduction cost per square foot of ground area;

(c) Determination from the applicable schedule of the *percentage point index* applicable to the residence, in order to refine the said basic reproduction cost by taking account of variations in types of material used and number of refinements incorporated;

(d) Multiplication of the basic reproduction cost per square foot, times the number of percentage points in the said percentage point index, in order to obtain unit price per square foot and unit cost; then the multiplication of this unit cost times the ground area in square feet in order to obtain the undepreciated value of the residence; and

(e) Application of percentages contained in specified tables for depreciation and obsolescence, in order to obtain the depreciated value of the residence for assessment purposes.

7. In purported compliance with and purportedly under the terms of the aforesaid Act of the Indiana General Assembly of 1949, the aforesaid Regulation No. 12, and the aforesaid Real Estate Assessment Guide No. 1, each of the above-mentioned forty-five sets of apartment buildings was reassessed for taxation purposes by the defendants herein or by such of said defendants as by law were authorized to make

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or participate in the making of such reassessment, said reassessment being accomplished as follows:

(a) Some time prior to May 15, 1950, the exact date being unknown at this time by the plaintiff, the defendant Martin Fulling, Assessor, Knight Township, Vanderburgh County, State of Indiana, reassessed each of said above mentioned sets of improvements at the value of Ten Thousand Nine Hundred Thirty Dollars ($10,930.00), and notification of such assessment or reassessment was received by the plaintiff under a notice dated March 1, 1950, by said Martin Fulling, Assessor. In making said reassessment, each of said improvements was graded properly as Low Cost; but otherwise in making said reassessment, the said Martin Fulling, Assessor, wrongfully, unlawfully, illegally and in violation of the applicable laws, rules, regulations, forms and standards, incorrectly made and computed said reassessment, in that he erroneously computed the percentage point index referred to in Paragraph 6(c) hereof so that each of said improvements was reassessed at a value far in excess of the value required by a proper and legal application of the laws, rules, regulations, forms and standards applicable to such reassessment. A copy of the findings and determinations of the Assessor's Office as to each set of improvements on the question of grade, dimensions and features, but excluding the computation and determination of points and values, is attached hereto and made a part hereof and marked "Exhibit B", these findings and determinations as to each set of improvements being identical.

(b) The plaintiff thereupon appealed to the County Board of Review of Vanderburgh County, Indiana, from said assessment made by Martin Fulling, Assessor, Knight Township, as hereinbefore alleged. On May 26, 1950, the plaintiff appeared before said County Board of Review and brought to the attention of said Board the said error of the Assessor in computing the percentage point index. The said Board took the appeal under advisement, and caused inquiry to be made of the State Board of Tax Commissioners as to the correct

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method of computing said percentage point index. The State Board of Tax Commissioners made reply to the said inquiry, stating that the computation method used by the said Assessor had been erroneous, as contended by the plaintiff, and giving instructions as to the proper computation method to be used.

(c) Thereafter, and on a date now unknown to this plaintiff, said County Board of Review changed the assessment on each of the said forty-five (45) sets of improvements to the value of Eight Thousand Eight Hundred Sixty Dollars ($8,860.00). In making said change in said assessments the said County Board followed the aforesaid instructions of the State Board of Tax Commissioners in the computation of the percentage point index, but unlawfully, arbitrarily, capriciously and without reasonable basis in fact (all as more particularly set forth in rhetorical paragraphs 8 and 9 hereof) and without giving to the plaintiff notice of its intention to do so, or an opportunity for a prior hearing thereon, graded each of the said improvements as "Average" rather than "Low Cost." By reason of said change in the grade of the said improvements, and by reason of certain other errors not here material, each of said improvements was assessed in violation of the applicable laws, rules, regulations, forms and standards and at a value far in excess of the value which would result from a proper, legal and reasonable application thereof. This plaintiff was notified of said change in assessment as to each of the improvements by notices also dated March 1, 1950, by Martin Fulling, Assessor, and being entitled, "Corrected notice by the Board of Review."

(d) Thereafter, on June 28, 1950, the plaintiff appeared again before the County Board of Review in order to present evidence that the said improvements should be graded "Low Cost" rather than "Average", and in order to bring to the Board's attention certain other errors not here material. The plaintiff presented detailed evidence as to the reasons why the said improvements should be graded "Low Cost" rather than

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"Average", said reasons being more fully stated in Paragraph 8 hereof. No other evidence was presented to the said Board in the plaintiff's presence. At the conclusion of the plaintiff's evidence the Board dismissed the plaintiff and stated that the matter would be taken under advisement. Thereafter, the County Board of Review, in recognition of certain errors not here material, changed the assessment on each of the said improvements to Eight Thousand Seven Hundred Dollars ($8,700.00); but the said Board unlawfully, arbitrarily, capriciously and without reasonable basis in fact (all as more particularly set forth in rhetorical paragraphs 8 and 9 hereof) continued to grade said improvements as "Average" rather than "Low Cost," so that each of said assessments was in violation of the applicable laws, rules, regulations, forms and standards and was at a value far in excess of the value which would result from a proper, legal and reasonable application thereof. The Board notified the plaintiff of the said change by a letter dated July 7, 1950, which stated that the final assessment would be said sum of Eight Thousand Seven Hundred Dollars ($8,700.00) for each of the forty-five (45) sets of improvements.

(e) Thereafter, on July 11, 1950, the plaintiff appealed the assessment on each of said improvements to the State Board of Tax Commissioners. On September 29, 1950, pursuant to permission granted by the said Board, the plaintiff appeared in Vanderburgh County before representatives of the said Board and presented detailed evidence as to the reasons why the said improvements should be graded as "Low Cost" rather than "Average", said reasons being more fully stated in Paragraph 8 hereof. No other evidence was presented to said representatives in the plaintiff's presence. At the conclusion of the plaintiff's evidence the said representatives dismissed the plaintiff and stated that the matter would be taken under advisement. Thereafter, on December 4, 1950, the plaintiff received from the State Board of Tax Commissioners a notice dated November 29, 1950, advising the plaintiff that the

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said Board declined to change the assessments of the aforesaid improvements from the assessments made thereon by the County Board of Review. The plaintiff thereupon, on December 5, 1950, appeared before the State Board of Tax Commissioners in Indianapolis and renewed its contention that the said improvements should be granted "Low Cost" rather than "Average". No evidence in opposition to the said contention was presented to said Board in the plaintiff's presence. Thereafter, the said Board notified the plaintiff that no change or correction would be made in the said assessments. The said Board thereby determined, unlawfully, arbitrarily, capriciously and without reasonable basis in fact (all as more particularly set forth in rhetorical paragraphs 8 and 9 hereof), that the said improvements should be graded "Average" rather than "Low Cost," so that each of such assessments, which by reason of the said action of the said Board remains at a value of Eight Thousand Seven Hundred Dollars ($8,700.00), was and is in violation of the applicable laws, rules, regulations, forms and standards and was and is at a value far in excess of the value which would result from a proper, legal and reasonable application thereof.

(8) The determinations of the County Board of Review and the State Board of Tax Commissioners that the said improvements are properly classified as "Average" rather than "Low Cost" are unlawful, arbitrary, capricious and without reasonable basis in fact, and deprive the plaintiff of its property without due process of law and deny the plaintiff the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution and deprive the plaintiff of its remedy by due course of law in violation of Article One, Section Twelve of the Constitution of Indiana, and deprive the plaintiff of its right to a uniform and equal rate of assessment and taxa-

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tion in violation of Article Ten, Section One of the Indiana Constitution, for the following reasons among others:

(a) The said improvements were constructed as emergency war housing in 1943, for the purpose of affording living quarters to the employees of local industrial plants, which had greatly expanded by reason of the wartime emergency. Because of the great urgency of the need, and because of wartime shortages of materials and skilled labor, it was necessary to construct these apartments, and they were constructed, in a very short space of time, and under adverse weather conditions detrimental to the quality of the said structures with little regard to building codes and of substandard materials and workmanship since inferior labor and materials were the only labor and materials available. In the design and construction of the apartments everything was sacrificed to the pressing need to simplify construction and save time and materials, with the result that their design and construction is inferior to the design and construction of the average apartments constructed in peacetime. There is no reasonable basis in fact upon which these apartment improvements can be graded in any other classification than "Low Cost," as that term is used in the instructions set forth in said Real Estate Assessment Guide No. 1.

(b) There are in Vanderburgh County two and only two other apartment properties which are comparable to the apartment improvements here in question. The names of the two said apartment properties, both of which are in active competition with the apartment properties here involved, are Anchor Court and Rotherwood Court. Each of said apartment properties consists of a number of 8-apartment units of improvements identical in size and similar in design to those here involved. The Anchor Court apartments were built at approximately the same time as the apartment properties here involved, but were constructed of a somewhat better grade of materials because, being a small project,

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they did not require such large quantities of materials and procurement problems were therefore simplified. The County Board of Review nevertheless graded the Anchor Court apartments as "Low Cost," and they have consequently been assessed at $6,970.00 for each 8-apartment unit of improvements, as compared with $8,700.00 for the forty-five (45) 8-apartment units of improvements here involved. The Rotherwood Court apartments were built in 1941, before the stringency of wartime shortages of labor and materials had made itself felt, and are of much better construction, both as to workmanship and as to materials, than the apartment improvements here involved. The Rotherwood Court apartments have been graded "Average"; and of the twelve (12) 8-apartment units of improvements which comprise them, nine (9) have been assessed at $7,340.00, two (2) have been assessed at $7,190.00, and one (1) has been assessed at $7,440.00, as compared with $8,700.00 for the forty-five (45) 8-apartment units of improvements here involved. In grading the Anchor Court Apartments as "Low Cost" and the apartment improvements here involved as "Average"; in grading the Rotherwood Court Apartments and the apartment improvements here involved as both "Average"; and in assessing the apartment improvements at Anchor Court and Rotherwood Court at far less than the apartment improvements here involved, the assessment authorities have discriminated against the plaintiff unlawfully, arbitrarily, capriciously and without reasonable basis in fact.

(9) The determinations of the County Board of Review and the State Board of Tax Commissioners that the said improvements here involved are properly graded "Average" rather than "Low Cost" were arrived at either (a) on the sole basis of the evidence presented on that issue by the plaintiff, or (b) on the basis of evidence presented by other persons whom the plaintiff had no opportunity to confront and cross-examine, and whose testimony the plaintiff had no opportunity to hear and rebut. In the

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former event, the said determinations are unlawful, arbitrary, capricious and without reasonable basis in fact because it could not reasonably have been determined, on the basis of evidence presented by the plaintiff, that the said improvements should be graded "Average," and said determinations are therefore contrary to law. In the latter event, the said determinations have been made without affording to the plaintiff an opportunity for a full hearing as required by law, unless and until such hearing is granted in this judicial proceeding because the plaintiff has had no opportunity to confront and cross examine the witnesses against it and to hear and rebut their testimony. In either event, the plaintiff has been and will be deprived of its property without due process of law and has been and will be denied the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution and will be denied its remedy by due course of law in violation of Article One, Section twelve of the Indiana Constitution, unless this Court will hear and determine the issues tendered by this amended petition in appeal and amended complaint.

(10) The reassessment of each of said sets of improvements at the value of Eight Thousand Seven Hundred Dollars ($8,700.00) is arbitrary, capricious, excessive, wrong, unlawful, illegal and void and constitutes a constructive fraud upon the plaintiff for the reasons that each of said defendants authorized to act in any way in making or determining said reassessment as to each of said improvements acted wrongfully, unlawfully and illegally, separately, or conjunctively or both, in one or more of the following particulars:

(a) They violated the applicable law set forth in an Act entitled, "An Act Concerning the Reassessment of Real Estate and Improvements Thereon for Taxation Purposes" of the General Assembly of the State of Indiana, Acts of 1949, Chapter 225, and the applicable rules, regulations, forms and standards adopted and prescribed by the State Board of Tax Commissioners pursuant to said Act of the Indiana General Assembly including but not being limited to

Real Estate Assessment Guide No. 1, prepared by the State Board of Tax Commissioners all as more fully set forth above.

(b) They arbitrarily, capriciously, wrongfully, unlawfully, illegally and without reasonable basis in fact changed the grade of each of said improvements from "Low Cost," as correctly and properly determined by the Knight Township Assessor, to "Average," and thereafter arbitrarily, capriciously, wrongfully, unlawfully and illegally, and without reasonable basis in fact, refused to correct said error by reclassifying each of the said improvements as "Low Cost."

(c) They assessed each of the said improvements at a value so grossly excessive and so far in excess of the assessments made on similar properties in the same locality, as to compel the conclusion that the assessments here involved were made in disregard of the applicable laws, rules, regulations, forms and standards, and resulted from an intentional and purposeful discrimination against the plaintiff, all of which has deprived the plaintiff of its property without due process of law and denied to the plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution and deprived the plaintiff of its right to a uniform and equal rate of assessment and taxation in violation of Article Ten, section one of the Indiana Constitution.

(d) To the extent that any of said defendants did not actively commit any of the foregoing wrongful, unlawful and illegal acts in making and determining said reassessment, they acted wrongfully, unlawfully and illegally in failing to relieve this plaintiff of the wrongful, unlawful and illegal result of such wrongful, unlawful and illegal acts in those cases where it was properly within their power to do so.

11. On December 9, 1950 and being within ten (10) days from and after the date of November 29, 1950 given as the time that the State Board of Tax Commissioners

determined the valuation of said improvements and being within five (5) days from and after December 4, 1950, the date that the plaintiff received notice of such action by the State Board of Tax Commissioners, the plaintiff filed with the State Board of Tax Commissioners for the State of Indiana and with the County Board of Review of Vanderburgh County, State of Indiana, a written notice asking for an appeal from the action of said County Board of Review and said State Board of Tax Commissioners, fixing the value of each of said improvements for purposes of taxation, all in accordance with the provisions of the Acts of the Indiana General Assembly, 1927, Chapter 91, Section 2, page 233 (Burns Indiana Statutes, 1943 Replacement, Sec. 64-1020).

12. The assessment of Eight Thousand Seven Hundred Dollars ($8,700.00) on each of said sets of improvements being illegal and void, it should be set aside and caused to be corrected. In addition, the plaintiff is entitled to a judgment enjoining the defendant John Ellert, County Auditor of Vanderburgh County, Indiana, from entering said reassessment upon the tax duplicates of said Vanderburgh County, and enjoining the defendant Clyde Oviatt, County Treasurer, Vanderburgh County, Indiana from collecting any tax on the basis of said reassessment and from collecting any taxes on any of said improvements for the year 1950 and thereafter until said reassessment has been properly made, determined and fixed under order of this Court for the reason that if said assessment were entered upon the tax duplicates and taxes so collected, the plaintiff would be irreparably injured and it has no adequate remedy at law.

WHEREFORE, THE PLAINTIFF PRAYS THAT THIS COURT hear evidence herein; that this Court determine this appeal from the State Board of Tax Commissioners of the State of Indiana; that this Court determine this appeal from the County Board of Review of Vanderburgh County, State of Indiana; that the action of changing the grade of each of said improvements from "Low Cost" to "Average" be declared null and void, and that the grade of "Low Cost" initially established by the Assessor of Knight Township

in making the reassessment be declared to be the proper grading for each of said improvements in determining and computing and making the reassessment on each of said improvements; that this Court either correct or order the proper officials who are defendants herein to correct the assessment on each of said improvements so as to conform to the applicable laws, rules, regulations, forms and standards of the State of Indiana; that the defendant Clyde Oviatt, County Auditor of Vanderburgh County, State of Indiana and his successor in office be enjoined from entering said illegal assessments upon the tax duplicates of Vanderburgh County; that the defendant John Ellert, County Treasurer of Vanderburgh County, Indiana, and his successors in office be enjoined from collecting taxes based upon said illegal assessments and from collecting any taxes on any of said improvements for the year 1950 and thereafter until said reassessments have been made properly, determined and fixed under order of this court; and for all other further relief which the Court deems equitable and proper in the premises.

WALLER, MCGINNIS & MERRILL,
By D. BAILEY MERRILL,
Attorneys for Plaintiff,
Columbia Properties, Inc.

APPENDIX C

EXTRACT FROM ASSIGNMENT OF ERRORS IN SUPREME COURT OF INDIANA ON APPEAL FROM VANDERBURGH CIRCUIT COURT

The Appellant says that there is manifest error in the judgment and proceedings, prejudicial to the Appellant, in this cause in this:

* * * * * * *

6. The Court erred in holding that the statutes of the State of Indiana relating to property tax assessments (including but not being limited to Acts of the Indiana General

Assembly 1927, Chapter 91, Sec. 2, page 233 [Burns' Indiana Statutes Annotated, 1951 Replacement, Section 64-1020], and Acts of the Indiana General Assembly 1949, Chapter 225, p. 722) authorize the making of final tax assessments of the Appellant's property without opportunity to the Appellant to obtain a full hearing by an impartial tribunal on the correctness of such assessments, including an opportunity to confront and cross-examine opposing witnesses and to hear and refute their testimony; and in holding that the said statutes, as so construed, do not deprive the Appellant of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

7. The Court erred in holding that the statutes of the State of Indiana relating to property tax assessments (including but not being limited to Acts of the Indiana General Assembly 1949, Chapter 225, p. 722) authorized final tax assessments of Appellant's property at valuations that arbitrarily discriminate against the Appellant and the Appellant's property as compared to the tax assessments of other similar properties in the same locality, and in holding that the said statutes, as so construed, do not deny to the Appellant the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution; and in holding that such arbitrarily discriminatory tax assessments of the Appellant's property do not deny to the Appellant the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

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